1960

Walter H. Ruf v. Association for World Travel Exchange and James F. Kenny : Brief of Defendants and Appellants

Utah Supreme Court

Hanson, Baldwin & Allen; Attorneys for Defendants and Appellants;

IN THE SUPREME COURT

of the

STATE OF UTAH

WALTER H. RUF,

Plaintiff and Respondent,

—vs.—

ASSOCIATION FOR WORLD TRAVEL EXCHANGE and JAMES F. KENNY,

Defendants and Appellants.

Case No. 9114

BRIEF OF DEFENDANTS AND APPELLANTS

HANSON, BALDWIN & ALLEN

Attorneys for Defendants and Appellants

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STATEMENT OF FACTS

This action was brought as the result of an automobile accident which occurred September 5, 1958, at the intersection of Eighth South Street and Fourth East Street in Salt Lake City, Utah. The accident happened at about 5:40 p.m. (R. 47).

The plaintiff was driving his car east on Eighth South Street and the defendant James F. Kenney was driving a car owned by the defendant Association for World Travel Exchange north on Fourth East Street. At the time of the accident the defendant Kenny was an

agent of the other defendant, acting in the scope of his employment. (R. 50). At the intersection there are stop signs regulating north and southbound traffic on Fourth East Street. The defendant Kenny failed to see the sign and was unable to stop the car driven by him before colliding with the plaintiff's car at a point 17 feet 4 inches north of the south line of Eighth East, and 38 feet 6 inches east of the west line of 4th East: or at about the center of the intersection. (R. 50).

The plaintiff saw the defendant's car at about the point where it was near the location of the stop sign when he observed the danger of the collision. He attempted to speed up to avoid a collision but was unable to do so. (R. 69).

As a result of the collision the plaintiff was thrown from his car to the street. He suffered a contusion to the left buttocks and acute strain of the lubo-sacral area. (R. 140).

The plaintiff had a pre-existing condition in his back, consisting of a narrowing of the inter-vertebral space in the region of the fifth lumbar vertebra; and he had sustained a previous injury to his back in 1953 or 1954. (R. 142).

This case was tried to a jury beginning on May 20, 1959, and resulted in a verdict in favor of the plaintiff and against the defendants in the amount of Thirteen Hundred Forty-four and 57/100 Dollars ($1,344.57) special damages, and the sum of Twenty Thousand Dollars ($20,000.00) general damages.

Thereafter a Motion was made on behalf of the defendants for Judgment Notwithstanding The Verdict Or In The Alternative A New Trial. This motion was denied by the trial judge July 17, 1959. (R. 205).

STATEMENT OF POINTS

POINT I

THE VERDICT IS EXCESSIVE, UNSUPPORTED BY THE EVIDENCE, AND IS THE RESULT OF PASSION AND PREJUDICE.

POINT II

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE TO GRANT A NEW TRIAL.

POINT III

THE COURT ERRED IN GIVING INSTRUCTION NO. 9, IN THAT IT PERMITS THE JURY TO SPECULATE ON PLAINTIFF'S PROBABLE LOSS OF EARNINGS, AND THE INSTRUCTION IS NOT JUSTIFIED BY THE EVIDENCE.

POINT IV

THE COURT'S INSTRUCTIONS ON DAMAGES WERE UNBALANCED IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS AND INFLUENCED THE JURY TO RETURN AN EXCESSIVE VERDICT.

ARGUMENT

POINT I

THE VERDICT IS EXCESSIVE, UNSUPPORTED BY THE EVIDENCE, AND IS THE RESULT OF PASSION AND PREJUDICE.

POINT II

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE TO GRANT A NEW TRIAL.

Points I and II of necessity must be argued together because they are related to the same propositions.

Appellants filed a timely Motion for Judgment Notwithstanding the Verdict or For a New Trial. (R. 203). This motion was argued and denied by the court. (R 205). The grounds upon which the motion was based are detailed in the motion filed.

Plaintiff Walter H. Ruf was taken to the L.D.S. Hospital after the accident. X-rays were taken and he was treated as an out-patient and was released to go home two and one-half hours after arriving at the hospital. (R. 73).

Saturday and Sunday, September 6th and 7th, he remained at home, but went to work Monday, September 8th. He worked in the office and did no outside selling until September 17th. (R. 77).

He was working for Schreyer Typewriter Company as a salesman, on a commission basis, with a guarantee of $250.00 per month. (R. 84).

Special damages incurred as a result of the accident include: Car damage, $403.50; L.D.S. Hospital for X-rays, $35.00; Dr. Allred, $35.00; back brace, $19.50; and $36.50 to repair an adding machine that was damaged; a total of $529.50.

After the initial examination by Dr. Allred, Ruf did not see the doctor again until September 10th, at which time his condition was improved, but he did complain of back pain. (R. 138-141). From the date of the accident

until the time of trial, Ruf saw the doctor eight times. (R. 141).

Dr. Allred testified at trial that the accident did precipitate pain, but did nothing to injure Ruf's back, and all of the back trouble was a result of a previous degenerative collapse of the intervertebral disc. Dr. Allred testified that the condition which brought about the pain of which Ruf complained, existed at the time the accident occurred. (R. 152). The condition shown in the X-rays of Ruf taken by Dr. Allred showed only a degenerative condition of the back. (R. 149).

Obsessity of plaintiff and his carrying heavy machines put an extra strain on his back and increased the degenerative process, and spinal fusion is necessary because of the advanced degenerative process. (R. 150).

After the fusion operation, Ruf could go back to the same work as he had before and he would have no pain in the degenerated portion of the back. (R. 152).

At no time did Dr. Allred testify that the accident caused any aggravation of the pre-existing degenerative condition, but he stated that in his opinion the accident precipitated pain. There is not one iota of testimony in the record that the accident aggravated the pre-existing condition and Dr. Allred was careful in his testimony to clearly explain that the pre-existing condition was a degenerative process, but no testimony was given that it was aggravated.

A search of the record reveals no testimony on the part of plaintiff's doctor that there was any objective symptoms of disability.

Dr. Paul Milligan of Salt Lake who was called as a witness by the defendant testified that there were no objective findings of disability or limitation of motion, and that Ruf had normal motion of the back for his age. (R. 164).

The only evidence in the record is that Ruf had no objective disability or limitation of motion.

Dr. Milligan went into detail explaining the degree of degeneration of the spine, and testified that there had been a collapse of the disc and that the last vertebra was resting almost directly on the sacrum. (R. 163).

There is no question that Mr. Ruf had an advanced degeneration of a vertebral disc and that the condition of the collapse of the vertebral disc would cause pressure on the nerves and pain.

There is no evidence that the accident in any way hastened the degeneration or aggravated the pre-existing condition of Mr. Ruf's back.

It is significant that plaintiff's attorney never asked Dr. Allred whether or not there were any *objective* signs or symptoms of aggravation of the pre-existing condition, and never asked him if there had been any aggravation of the pre-existing condition. Plaintiff's attorney asked Dr. Allred only as follows:

"Q. Well, do you have an opinion, Doctor, as to whether the accident in which Mr. Ruf was involved on September 5, 1958, precipitated the symptoms of which he now complains?

A. I would say I have.

Q. And what is your opinion?

A. It is my opinion that the condition, the basic underlying condition existed prior to the accident. However, it was not causing pain and that the accident actually precipitated the symptoms which he now has."

There was no testimony at trial concerning any other injuries suffered by Mr. Ruf, except Ruf's own testimony as to pain in the chest and some pain in the elbow, which have healed with no apparent disability or difficulty. There is no testimony that these injuries necessitated any medical treatment.

This court, in several cases, held that a verdict so excessive as to *appear* to have been given under the influence of passion and prejudice, and the trial court abusing its discretion in denying a motion for a new trial, may order the verdict set aside and a new trial granted. *Pauly v. McCarthy*, 109 Utah 431; 184 P2nd 123.

The court has quoted with approval the language of the *Pauly v. McCarthy* case. In the case of *Stamp v. Union Pacific Railroad Company*, 5 Utah 2nd 387; 303 P2nd 279, the opinion approved the statement of the law in the *Pauly v. McCarthy* case and quoted from that case as follows:

> "Attention is called to the language of this court in that (Pauly vs. McCarthy) case as follows), at pages 434-6 of the Utah Reports and page 125 of the Pacific Reporter:
>
> > 'but from the language used in these and other decisions, a view developed that this court was powerless to interfere with a jury

> verdict, no matter how outrageous. This view was exploded in the case of *Jensen v. Denver & R.G.W.R. Co.*, 44 Utah 100, 138 Pac. 1185, 1192, where, after citing with approval many of the cases above cited we said: "still the jury cannot be permitted to go unbridled and unchecked. Hence the Code that a new trial on motion of the aggrieved party may be granted by the court below on the ground of 'excessive damages appearing to have been given under the influence of passion or prejudice.' Whenever that is made to appear, the court, when its action is properly invoked, should require a remission or set the verdict aside and grant a new trial." '

This court has held that it can and should grant a new trial if the verdict is so excessive as to show that it must have been motivated by prejudice or ill will toward a litigant, or that passion such as anger, resentment, indignation or some kindred emotion has so overcome or distorted the jury's reason that the verdict is vindictive, vengeful or punitive, it should unconditionally be set aside. *Wheat v. D&RGWR Company*, 122 Utah 418, 250 P2nd 932.

Appellants recognize that the Utah Court recognizes two classes of cases; recognizing one class of cases wherein a new trial must be ordered if the verdict is the result of passion and prejudice; and a class of cases whereby a remittitur is demanded by the ends of justice. *Pauly v. McCarthy*, 109 Utah 431, 184 Pac 2nd 123; *Morgan vs. Ogden Union Depot*, 77 Utah 541, 294 Pac 2nd 541. *Ward vs. D&RGWR Co.*, 96 Utah 564, 85 Pac. 2nd 837.

The Utah Court has long held that it may be proper

to order a remission of the excess verdict where passion and prejudice were not necessarily present, but if passion and prejudice were present, a new trial should be granted. See *Eleganti vs. Standard Coal Co.,* 50 Utah 585, 168 Pac 266, and *McAffee vs. Ogden Union R.R. Depot Co.*, 62 Utah 116, 218 Pac. 98.

In the case of *Duffy vs. Union Pacific Railroad Company*, 118 Utah 82, 218 P2nd 1080, the Court said:

> "Previously decided cases are of little value in fixing present day standards or in assisting courts in determining excessive awards."

This quotation was approved in the *Stamp vs. Union Pacific Railroad Company* case, 5 Utah 2nd 387, 303 P2nd 279, and the court in that case in ordering a remittitur or a new trial stated:

> "Holding as we do, that the verdict is without all reasonable bounds for the detailed injury, we then have the duty of ordering a new trial, or ordering a remittitur. Since the jury's verdict can be of no help to us, we must exercise our best judgment in arriving at a fair and just amount to compensate plaintiff for his injury."

In that case quoted there was nothing for the court to base a holding of passion and prejudice except the amount of the verdict.

As related in the opening portion of the argument on these points, the plaintiff suffered no back injury, only a claimed precipitation of symptoms. The back condition, degeneration of the disc, allowing the vertebra to collapse, was in no way connected with the accident,

but existed prior to the accident. Admittedly, an operation, which would require a total of six months temporary disability, would restore plaintiff to a condition which was as good as before. The sum of $20,000 general damages and special damages of $1,344.57 is excessive. The verdict includes as special damages the cost of the back operation. Plaintiff's medical bills, not counting the back operation, total only $89.50, including X-rays and a back brace.

Plaintiff was never hospitalized. He returned to work Monday after the accident and saw the doctor only eight times, including the examination by the doctor to prepare for the trial testimony. No specific treatment was given or required. Admittedly, the man required a spinal fusion operation to repair the *degenerative disease* that *pre-dated the accident,* and which was in no way related to the accident by causation or aggravation. $20,000 general damages in such a case clearly appears to have been given as a result of passion and prejudice.

POINT III

THE COURT ERRED IN GIVING INSTRUCTION NO. 9, IN THAT IT PERMITS THE JURY TO SPECULATE ON PLAINTIFF'S PROBABLE LOSS OF EARNINGS, AND THE INSTRUCTION IS NOT JUSTIFIED BY THE EVIDENCE.

The third paragraph of the court's Instruction No. 9 reads as follows:

> "If the impairment of earning capacity is permanent, then the period of computation of loss would be the time that it could reasonably be anticipated plaintiff would be gainfully employed, which might but may not necessarily be for the plaintiff's full life expectancy."

It is the position of the defendants that this portion of the instruction is prejudicial to them and wholly unsupported by the record. It was excepted to in the usual form. (R. 193).

Defendants maintain that this portion of the instruction permits the jury to speculate as to the loss of earning capacity of the plaintiff, if they believe the impairment, if any, was of a permanent nature; because there is not any evidence documentary or otherwise concerning the plaintiff's life expectancy or the period for which he might be gainfully employed.

It seems obvious from the size of the award that the jury must have awarded the plaintiff part of that amount upon the basis of a permanent impairment.

If this is the fact, the verdict and the judgment ought not to stand because it is inconsistent with the jury's award to the plaintiff of the cost of surgical repair. It is the testimony of plaintiff's physician that after six months following the surgical repair he recommended the plaintiff could return to his usual employment. (R. 146).

Dr. Allred, the plaintiff's physician, testified that the total cost of surgery, medical and hospital bills would be approximately $800.00. This amount was included in the amount of special damage awarded the plaintiff. The jury awarded to plaintiff the total amount which the court indicated it could award for special damages, including past and future medical bills. (Instruction No. 8. R. 37).

It is generally the law, and has been so held by this court, that it is prejudicial error to give an instruction which has no foundation in the evidence.

Among the cases so holding is *Wilcock v. Baker,* 238 P. 253, 65 Utah 435.

This was an action for the purchase price of certain cattle, and the defense was that the plaintiffs had agreed to accept payment from a third party to whom the defendant had sold the cattle. The verdict was for the defendant, and the plaintiffs appealed.

One of the questions raised was as to the court's instruction that the plaintiff Liston was bound by the substitution of a third party for the payment of the cattle which were purchased by the defendant. There was no evidence to support this proposition and the court held that it was reversable error.

On pages 254 and 255 of 238 P. the court had the following to say:

> "In the court's Tenth Instruction the jury were advised that, if they found that Don C. Liston was a joint owner of the cattle with Wilcock and that Liston authorized his co-plaintiff to conduct and carry on the business with defendant relative to disposal of the cattle, then Liston would be bound by any agreement of novation or substitution which might have been entered into by Wilcock."

It is vigorously argued that the instruction was misleading; that there is no issue made by the pleadings that Wilcock was an authorized agent of Liston; and

that there is no evidence in the record upon which such an instruction could be based. It is, therefore, strenuously contended that the giving of the instruction was prejudicial error, in that it permitted the jury to speculate upon an issue of fact which was not an issue made by the pleadings, and that to support such issue there was no evidence had it been an issue within the pleadings. We are of the opinion that the pleadings are sufficiently broad to include the issue of fact submitted. But not only must an instruction be within the issues joined and made by the pleadings, but it must likewise have as a basis some testimony to support a finding by the jury upon the issue of fact submitted by the instruction. *Davis v. Midvale City,* 56 Utah 1, 189 P. 74; *Bank vs. Taylor,* 38 Utah 516, 114 P. 529; *Sagers vs. International Smelting Company,* 50 Utah 423, 168 P. 105.

With respect to this instruction, the court continues in its opinion on page 255 as follows:

> "We are of the opinion that there is no evidence in the record upon which Instruction No. 10 can be based must be allowed; likewise that the giving of that Instruction permitted the jury to speculate upon an issue of fact in the absence of evidence to support any finding or conclusion of the jury thereon. We are also of the opinion that the instruction submitted an issue of fact upon which a finding might prejudicially affect the rights of the plaintiff Liston. In any event, therefore, the judgment against Liston will have to be reversed."

Among the other cases decided by this court supporting the proposition that an instruction is prejudicial un-

less there is some evidence in the record to support it is the case of *Olsen v. Warwood,* 255 P.2nd 725, 123 Utah 111.

The following general statement on this proposition from that case is as follows:

> "It is well settled in this jurisdiction that an instruction must be based upon evidence and that it is prejudicial error to submit a charged act of negligence to a jury for its consideration in the absence of evidence tending to support a finding that the act occurred. *Smith vs. Clark,* 37 Utah 116, 106 P. 653; *Griffin* vs. *Prudential Insurance Company;* 102 Utah 563, 133 P.(2d) 333; *Kendall* vs. *Fordham,* 79 Utah 256, 9 P.2d 183. Likewise it is well settled that the court may not permit the jury to speculate upon the evidence that a finding of fact cannot be based upon surmise, conjecture, guess or speculation."

It is the position of the appellants that that portion of Instruction No. 9 to which exception was taken does violence to the rule announced by this court and was prejudicial in the extreme to the appellants and led to an unjustified and excessive verdict.

POINT IV

THE COURT'S INSTRUCTIONS ON DAMAGES WERE UNBALANCED IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS AND INFLUENCED THE JURY TO RETURN AN EXCESSIVE VERDICT.

The instructions of the court on the question of damages were contained in Instruction No. 8 (R. 37); Instruction No. 9 (R. 38); Instruction No. 10 (R. 39): and Instruction No. 13. (R. 42).

Defendants and appellants contend that the court over-accentuated the matter of damages and that the instructions on the damage issues were repetitious and gave undue prominence to the claimed damages and injury.

This case resulted in an excessive verdict and a point on this appeal, is that the verdict was excessive and a result of passion and prejudice. The giving of numerous instructions relating to the injury and damage sustained by plaintiff and respondent placed an undue emphasis upon the damage portion of the case; the instructions continually referring to and repeating certain propositions as to damages for which plaintiff could recover.

Instruction No. 8 (R. 37) generally gave the jury the proper instruction concerning damages plaintiff could recover. The court re-emphasized and restated in following instructions the elements and measure of damages stated in Instruction No. 8. (R. 37).

The instructions included several statements as to the recovery to be awarded plaintiff for general damages, and which were repetitious. Instruction No. 8 (R. 37) is as follows:

> "If you find the issues in favor of Mr. Ruf and against the defendants, it will be your duty to award to Mr. Ruf such damages as you may find from a preponderance of the evidence, will fairly and justly compensate him for any injury and damage he has sustained as a proximate result of the defendant's negligence.

"You may award such special damages as you find from a preponderance of the evidence the plaintiff is entitled to.

"Reasonable and necessary expenses for services rendered by doctors, for x-rays, medicines and prescribed items such as a steel corset for the back, actually incurred by plaintiff or shown with reasonable certainly will be incurred in the future.

"You should also award to Mr. Ruf such special damages as you find the plaintiff is entitled to for property damage to his automobile proximately resulting from the negligence of the defendants.

"In awarding general damages, you are instructed that you should also consider the nature and extent of the injuries sustained by him; the degree and character of his suffering, including pain, discomfort, fear, physical, mental or emotional distress, their probable duration and severity, and the extent to which he has been prevented from pursuing the ordinary affairs of life as heretofore enjoyed by him, and any disability or loss of earning capacity resulting from such injury.

"The law furnishes no way by which to measure what is reasonable compensation for mental and physical pain and suffering but it is left to the sound judgment and descretion of the jury to determine from a preponderance of the evidence what is reasonable compensation to compensate plaintiff for any physical or mental pain and suffering he has endured or will probably endure in the future.

"You are further instructed that you may take into consideration loss of body efficiency,

loss of energy and other disabilities which plaintiff may have suffered or which he will probably suffer in the future as a proximate result of defendant's negligence.

"In determining general damages, you may also consider whether the plaintiff will probably suffer in the future pain and suffering, disability or loss of earning capacity resulting from such injury, and if you so find, award such damages as will fairly and justly compensate the plaintiff therefor.

"Further of you find that plaintiff must undergo an operation made necessary as a proximate result of defendants negligence, then the reasonable costs of such operation together with the full loss of earning capacity during such period of recuperation shall be added to any award given plaintiff as damages.

"The total amount of special damages assessed for medical bills, x-rays, steel corset, property damage to Mr. Ruf's automobile and contents shall not exceed $1,344.57 and the total amount of general damages assessed for pain and suffering, loss of bodily function and earning capacity, may not exceed the sum of $45,495.02, being the amounts prayed for by plaintiff in his complaint."

The court in the first paragraph of the instruction tells the jury that the plaintiff may recover for any injury and damage he suffered as a result of defendants' negligence and then in paragraph 5 of the instruction, the court explains general damages, including pain, discomfort, fear, physical and mental or emotional distress; their probable duration and severity and the fact that plaintiff can recover for the extent he has been

prevented from pursuing the ordinary affairs of life.

In paragraph 6 of the Instruction 8 (R. 37), the court again tells the jury about recovery for physical or mental pain and suffering plaintiff has or will probably endure in the future.

In paragraph 7 of Instruction No. 8 (R. 37) the court again tells the jury about loss or disabilities plaintiff has, or will suffer in the future.

In paragraph 9 of Instruction No. 8 (R. 37) the court again discusses the matter of future pain and suffering, disability and loss of earnings.

In paragraph 10 of Instruction No. 8 (R. 37) again it is stated the law as to general and special damages which may be recovered by the plaintiff.

In Instruction No. 10 (R. 39) the court instructs the jury as follows:

> "You are instructed that if you find that plaintiff is entitled to recovery, he is only entitled to such damages as will reasonably and fairly compensate him for his injuries and pecuniary loss suffered or sustained by him as a result of the accident.
>
> "Sympathy for the plaintiff should in no manner influence your verdict.
>
> "The burden is upon the plaintiff to prove by a preponderance of the evidence the amount of his injury and damage, reasonably and naturally flowing from such injury. The burden likewise rests upon him, that is the plaintiff, to establish by a preponderance of the evidence,

the nature, character, and extent of his suffering and injuries, if any.

"You are further instructed that plaintiff is not entitled to recover for any claimed injury or damage which is of uncertain, speculative, or doubtful nature. Therefore, if the plaintiff shall have failed to prove any claimed injury or any claimed element of damage by a preponderance of the evidence, or if the evidence respecting any such matters is evenly balanced, you must resolve such issue in favor of the defendant.

"You are not allowed and must not speculate as to the extent and nature of the plaintiff's injuries, but if you find he is entitled to damages, he should be compensated only for those injuries which you find from a preponderance of the evidence were directly and proximately a result of the accident complained of. A party is not entitled to recover for imaginary injuries or injuries of a type or nature that are not a result of the accident or injury complained of."

This instruction in a great part again relates to the jury their duty to return damages for injuries by plaintiff, and specifically points out the right of recovery by plaintiff for pain and suffering that would result from the claimed back operation.

As to the right to recover for future loss of earnings, the court covers that question of damages in Instruction No. 8 (R. 37) in paragraphs 5, 7, 8, and 9.

Loss of earnings is again covered in Instruction No. 9 (R. 38) in the opening paragraph and in subparagraphs 1, 2, and 3.

"If you find the issues in favor of the plaintiff and that he has suffered a loss of earning capacity as a result of his injuries. you should award him such amount as will fairly and adequately compensate him for any loss of earning he is reasonably certain to suffer in the future because of such injury. In assessing such loss you should take these matters into consideration:

1. If the loss of earning capacity is not total, it will be plaintiff's duty to minimize his damages by seeking employment in any work that he is capable of performing, and earning as much as he can, and you should make due allowance for anything that he can reasonably be expected to earn in the future.

2. If the impairment of earning is not permanent, then the computation of damage must be based only on the period for which the temporary loss of capacity is reasonably certain to continue.

3. If the impairment of earning capacity is permanent, then the period for computation of loss would be the time that it could reasonably be anticipated plaintiff would be gainfully employed, which might but may not necessarily be for the plaintiff's full life expectancy."

Instruction No. 10 (R. 39) again refers to earning capacity by the statement in the opening paragraph that plaintiff can recover for pecuniary loss sustained:

"You are instructed that if you find that plaintiff is entitled to recovery, he is only entitled to such damages as will reasonably and fairly compensate him for his injuries and pecuniary loss suffered or sustained by him as a result of the accident."

Instruction No. 13 (R. 42) again covers the matter of loss of earnings in the second paragraph of the instruction:

> "In determining damages in respect to such matters you are instructed that the plaintiff is not required to submit to an operation to relieve the condition of his back, but may continue through life in his present aggravated condition, if you find such to be the case, and recover damages for the same. However, you may consider the likelihood of the performance of an operation and you may likewise consider the possibility of a cessation of the pain as a result thereof. You may consider the cost of such operation and the pain and suffering resulting therefrom and financial loss in earnings as a consequence thereof, if any."

In addition to the general instructions on recovery for injury including pain, suffering, mental suffering, etc., the court in its instructions emphasizes the damages to be recovered in event of an operation, and that damage matter is referred to in paragraph 9 of Instruction No. 8 (R. 37):

> "Further, if you find that plaintiff must undergo an operation made necessary as a proximate result of defendants' negligence, then the reasonable costs of such operation together with the full loss of earning capacity during such period of recuperation shall be added to any award given plaintiff as damages."

The court again instructed about the operation in Instruction No. 13 (R. 42), second paragraph:

> "In determining damages in respect to such

matters you are instructed that the plaintiff is not required to submit to an operation to relieve the condition of his back, but may continue through life in his present aggravated condition, if you find such to be the case, and recover damages for the same. However, you may consider the likelihood of the performance of an operation and you may likewise consider the possibility of a cessation of the pain as a result thereof. You may consider the cost of such operation and the pain and suffering resulting therefrom and financial loss in earnings as a consequence thereof, if any."

The instructions on damages unduly emphasize and are repetitious concerning the recovery for injury and damages. The court's instructions on damages repeat over and over again the matters for which plaintiff would be entitled to recover and it is to be noted that the instructions covering damages require four separate instructions, totaling five pages of instructions upon that question alone.

Appellants contend that the court committed error and over-emphasized the damage element of this case by the giving of the last paragraph of Instruction No. 8 (R. 37), setting forth the amount of damages claimed by the plaintiff. The giving of the amounts asked by plaintiff as damages is prejudicial and serves to over-emphasize the element of damages. There is no necessity or requirement for the court to tell a jury what amount is asked by plaintiff and the telling of the jury of such amount of the prayer of the complaint serves only to suggest large figures and amounts to the jury. No need

is served by telling the jury the amount of the prayer. If at any time a jury should return a verdict in excess of an amount prayed, then it is a law matter for the court. The prayer of the complaint is not a factual matter for the jury, but merely a law matter in event the verdict should exceed such prayer.

The court has recognized that the continued repetition of instructions, and the giving of unbalanced instructions, unduly emphasizing one party's case is prejudicial error. In the case of *Devine vs. Cook,* 3 Utah 2nd 134, 279 Pac. 2nd 1073, this court held that instructions of the trial court, even though correct in their entirety as given, which were a continual repetition of instructions of one party's theory or claims, and which unbalanced the instructions in favor of the defendants, constituted reversible error.

The court has quoted with approval the holding in the case of *Shields vs. Utah Light & Traction Company,* 99 Utah 307, 105 P2nd 347, wherein it was held:

> "The reiteration of given propositions to the jury in instructions does not have judicial approval, and the resulting emphasis on applicable laws favorable to plaintiff's side as the result of the continual reference and repeating of certain law propositions resulted in the unbalancing of the charge, and error."

Appellants contend that the trial court in an attempt to clarify the issues of damages, gave undue prominence to those issues and the elements contained in the damages. The instructions are lengthy, intricate, repetitious

and they are to appellants' disadvantage. By needless repetition on the issues and elements of damages, the court has lead the jury to believe that plaintiff was entitled to excessive damages.

The instructions in this case are within the doctrine specifically approved by the court and quoted in the *Devine vs. Cook* case, (supra), and which opinion by the court cites the case of *Keeshin Motor Express Co. Inc. vs. Glassman,* 219 Indiana 538, 38 NE 2nd 847, as follows:

> "With this situation it was incumbent on the trial court to clarify the issues without giving any of them undue prominence. This was not done. The Instructions as a whole are lengthy, intricate, repetitious, argumentative and confusing."

The language of the quoted case covers with dispatch appellants' view of the court's instructions concerning the damages in this case. The damage Instructions Nos. 8 (R. 37), 9 (R. 38), 10 (R. 39) and 13 (R. 42) are prejudicial to defendants because of undue emphasis, repetition and over-accentuation.

CONCLUSION

The appellants respectfully represent to the court that the defendants should be awarded a new trial or in the alternative the court should order a remittitur

and reduce the judgment to a reasonable amount based upon the evidence of the case.

Respectfully submitted,

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